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MOHAMAD EZAM MOHD NOR & ORS

v.

INSPECTOR GENERAL OF POLICE

b

HIGH COURT MALAYA, KUALA LUMPUR

AUGUSTINE PAUL J

[CRIMINAL APPLICATION NO: 44-15-2001]

25 APRIL 2001

c

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Function of the court when reviewing decision of executive*

ADMINISTRATIVE LAW: *Rules of natural justice - Bias - Whether judge would be seen to be bias - Whether basis for an application to disqualify made out*

d

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Test in determining validity of detention - Criminal Procedure Code, s. 365, Internal Security Act 1960, ss. 8, 16, 73*

e

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Whether sufficient reasons for such detention - Whether authorities bound to disclose reasons for the detention - Criminal Procedure Code, s. 365 - Internal Security Act 1960, ss. 8, 16, 73*

f

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Whether detention was in the exercise of a valid legal power - Whether authorities had proved that detention was in the exercise of a valid legal power - Criminal Procedure Code, s. 365 - Internal Security Act, ss. 8, 16, 73*

g

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Whether detention was in the exercise of a valid legal power- Whether applicants had proved that detention was unlawful - Whether applicants had made out mala fide case - Criminal Procedure Code, s. 365 - Internal Security Act, ss. 8, 16, 73*

h

CONSTITUTIONAL LAW: *Fundamental liberties - Right to counsel - Whether there was denial of legal representation - Whether such denial justified - Federal Constitution, arts. 5, 149, 151 - Internal Security Act 1960, s. 16*

i

On 10 and 11 April 2001, the police arrested and detained seven reformasi activists under s. 73(1) of the Internal Security Act 1960 ('the ISA'). In a press statement issued on 11 April 2001, the Inspector General of Police ('the respondent') referred to the date referred to as "Black 14" – the date of the conviction and sentence of the former Deputy Prime Minister, Dato Seri Anwar Ibrahim.

Five of the detained persons ('the applicants') filed a motion for the issue of a writ of *habeas corpus* to secure their release. *a*

Among the issues for consideration were: (i) whether the judge should disqualify himself considering that he was the judge who convicted and sentenced the former deputy prime minister, resulting in the date being referred to as "Black 14"; (ii) whether there were sufficiency of the reasons for the detention of the applicants; (ii) whether the respondent had discharged the burden to show that the applicants had been detained in the exercise of a legal valid power; (iv) whether the applicants had discharged the burden to show that their detentions were unlawful; (v) whether the applicants had made out a case of *mala fide* against the respondent; and (vi) whether there was denial of legal representation. *b*
c

Held:

[1] A judge in deciding a case is merely carrying out a constitutional function entrusted upon him by the Yang Dipertuan Agong. The decision made is based on admissible evidence on the arguments advanced by the parties. A judge has no interest in the outcome of his judgment. Any attempt made to hold a judgment against the decider whether directly or indirectly, explicitly or implicitly or even dressed and fashioned as a perception will strike at the very core of the administration of justice and lead to the destruction of the independence of the judiciary. *d*
e

[1a] A perusal of the judgment against the former Deputy Prime Minister would reveal that there was absolutely no reference whatsoever to the reformasi movement. "Black 14" was undoubtedly a date to commemorate the delivery of the judgment on 14 April 1999. It had nothing to do with the merits or demerits of the judgment that was delivered. The application to disqualify therefore was frivolous, vexatious and an abuse of the process of the court. *f*

[2] It is not the function of the court to act as a court of appeal from the discretionary decision of the executive and to inquire into the grounds upon which they came to the belief that it was necessary or desirable in the interests of the security of Malaysia to hold a person in detention. *g*

[2a] The test to determine the validity of a detention order made under s. 8(1) of the ISA is subjective with the result that the court cannot require a police officer to prove to the court the sufficiency of the reason for the belief under s. 73(1) of the ISA. It is for the authorities however to show that the person has been detained in exercise of a valid power. *h*

[2b] Once it is shown that the person has in fact been detained in exercise of a valid power, it is for the detainee then to show that the power has been exercised *mala fide* or improperly. *i*

- a* [3] There is no requirement for the arresting officer to set out the reasons for his belief in effecting the arrest. He must be satisfied that there are reasons to justify the detention. This means that he must be satisfied with the requirements of s. 73(1)(a) and (b) of the ISA. He need not disclose the reasons. Any disclosure of the reasons would in fact violate
- b* the right conferred by s. 16 of the ISA and art. 153 of the Federal Constitution.
- c* [3a] The facts disclosed that the respondent had filed three affidavits, the first affirmed by the arresting officer. The second by an inspector and the third by an assistant superintendent of police. In these affidavits the deponents had stated that they had reasons to believe that there were grounds warranting the arrest and detention of the applicants. The applicants therefore had been arrested and detained in the exercise of a valid legal power.
- d* [4] It is inappropriate for a person or body of persons to call for the release of persons detained under the ISA and to prosecute and try them in an open court if they have committed any offence as it amounts to an unlawful interference with the lawful exercise of discretion by the detaining authority. It is the detaining authority which is to decide
- e* whether an act which is criminal in character is of such nature or proportion as to threaten national security that it would be inadequate to deal with it as an ordinary criminal offence but warrants it being dealt with under the ISA.
- f* [4a] The arrest and detention of a person when he could have been prosecuted for a criminal offence is therefore no indication of *mala fides*.
- g* [5] Under art. 151(3) of the Federal Constitution and s. 16 of the ISA, the respondent had a right to make or not to make disclosures as he considered necessary. Partial disclosure of the facts therefore did not show bad faith on the part of the respondent.
- h* [6] The right to legal access in the case of a person detained under the ISA must be considered in the light of art. 151(3) of the Federal Constitution and s. 16 of the ISA. In the course of investigating into the activities of a detainee the police may have told the detainee certain facts and *vice versa* which may warrant further investigation. If access is allowed to a detainee in such circumstances there is a possibility that he may part with whatever information that has been communicated to him. Denial of legal access to a detainee until the police think that it is appropriate to do so is to achieve the object of the provision permitting
- i* non-disclosure of facts.

[6a] A detainee under the ISA can therefore have legal access only when it does not interfere with police investigations. Even if this conflicts with art. 5(3) of the Federal Constitution, it is validated by art. 149 of the Federal Constitution. **a**

[6b] In any event, the applicants had failed to show that the police had deliberately and with bad faith obstructed them from exercising their right under art. 5(3) of the Federal Constitution. **b**

[Applications dismissed.]

Case(s) referred to:

Athappan Arumugan v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1984] 1 MLJ 67 (**refd**) **c**

Bhimsen v. State of UP AIR [1955] SC 435 (**refd**)

Chng Suan Tze v. The Minister of Home Affairs & Ors & Other Appeals [1989] 1 MLJ 69 (**refd**)

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1984] 3 All ER 935 (**refd**) **d**

CS Appa v. MP Maricar AIR [1918] LB 36 (2) (**refd**)

Devi & Ors v. State [1963] 1 Cri LJ 543 (**refd**)

Hashim Saud v. Yahaya Hashim & Anor [1977] 2 MLJ 116 (**fol**)

Karam Singh v. Menteri Hal Ehwal Dalam Negeri [1969] 2 MLJ 129 (**fol**)

Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1993] 4 CLJ 155 (**not fol**) **e**

Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor [1971] 2 MLJ 137 (**not fol**)

Liew Sai Wah v. PP [1968] 2 MLJ 1 (**refd**)

Ooi Ah Phua v. Officer-in-Charge, Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 (**refd**) **f**

PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 (**refd**)

Pyx Granite Co Ltd v. Ministry of Housing and Local Government & Ors [1959] 3 All ER 1 (**refd**)

R v. Almon [1765] Wilm 243 (**refd**)

R v. Halliday [1917] AC 260 (**refd**)

RC Cooper v. Union of India [1970] 2 SCC 298 (**refd**) **g**

Re Ong Yew Teck [1960] MLJ 67 (**refd**)

Re Tan Sri Raja Khalid Raja Harun [1988] 1 MLJ 182 (**fol**)

Secretary of State v. Mask & Co AIR [1940] PC 105 (**refd**)

Tan Sri Raja Khalid Raja Harun [1988] 1 MLJ 182 (**refd**)

The Zamora [1916] 2 AC 77 (**fol**) **h**

Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293 (**refd**)

Yeap Hock Seng v. Minister for Home Affairs, Malaysia [1975] 2 MLJ 279 (**refd**)

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a Legislation referred to:

Criminal Procedure Code, s. 365
 Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 7(c)
 Federal Constitution, arts. 5(3), 149, 151(3)
 Human Rights Commission Act 1999, ss. 2(d), 4(4)
 Internal Security Act 1960, ss. 8B(1), 16, 73(1)(a), (b), (3)(a), (b), (7)

b**Other source(s) referred to:**

Law of Contempt of Courts, Iyers, pp 172, 683
 Universal Declaration of Human Rights 1948, art. 29(2)

c

For the applicants - Zainur Zakaria (R Sivarasa, Kamarul Hisham Kamarudin & Saiful Izham Ramli with him); M/s Daim & Gamany

For the respondent - Dato' Abdul Gani Patail DPP (Mohd Yusof Zainal Abiden, Abdul Karim Abdul Jalil, Kamaludin Mohd Said, Vong Poh Fah & Abdul Rasid Sudin with him)

Reported by Mariette Peters-Goh

d**JUDGMENT****Augustine Paul J:****e**

On 10 and 11 April 2001 the police arrested and detained seven reformasi activists under s. 73(1) of the Internal Security Act 1960 ("the ISA"). On 11 April 2001 the Inspector General of Police ("the respondent") issued a press statement. It reads as follows:

KENYATAAN AKHBAR
 MENGENAI PENANGKAPAN DI BAWAH
 AKTA KESELAMATAN DALAM NEGERI (AKDN) 1960

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Pada 10 dan 11 APR 2001 pihak polis telah menangkap dan menahan 7 orang aktivis reformasi di bawah Sek 73(1) Akta Keselamatan Dalam Negeri (AKDN) 1960. Mereka yang ditangkap dan ditahan adalah:-

g

- 1.1. MOHAMAD EZAM bin MOHD NOR – 34 tahun;
- 1.2. CHUA TIAN CHANG – 37 tahun;
- 1.3. NISAMUDDIN bin MD RAIS atau HISHAMUDDIN RAIS – 50 tahun;
- 1.4. SAARI bin SUNGIB – 43 tahun;
- 1.5. GOBALAKRISHNAN A/L NAGAPAN – 41 tahun;
- 1.6. RAJA PETRA RAJA KAMARUDIN – 49 tahun; dan
- 1.7. ABDUL GHANI bin HAROON – 36 tahun

h**i**

2. Tangkapan dan penahanan ini dilakukan kerana terdapat maklumat-maklumat mengenai penglibatan mereka dalam kegiatan yang boleh memudaratkan keselamatan negara. Pihak polis perlu menjalankan siasatan yang rapi di atas maklumat-maklumat tersebut. Kegiatan reformasi yang bermula pada bulan SEP

- 98 merancang untuk menggulingkan kerajaan melalui demonstrasi jalanan secara besar-besaran dan bersiap-sedia untuk bertindak secara militan dengan mengambil beberapa pendekatan seperti berikut:- *a*
- 2.1. Telah melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan 'grenade launcher'; *b*
- 2.2. Menggunakan 'molotov cocktail', 'ball bearing' serta berbagai-bagai senjata berbahaya untuk menyerang pihak keselamatan bagi menimbulkan keadaan huru hara semasa demonstrasi jalanan di sekitar KUALA LUMPUR pada bulan OKT 1998; dan
- 2.3. Mendapatkan bantuan dan sokongan guru-guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan supaya menyertai gerakan mereka. *c*
3. Bagi membendung trend militan gerakan reformasi tersebut maka pihak polis telah mengambil tindakan ke atas 28 orang aktivis reformasi di bawah Sek 73(1) AKDN 1960 antara 20 SEP 98 hingga 24 DIS 98. Tindakan-tindakan pihak polis tersebut telah dapat meredakan keadaan buat sementara waktu. *d*
4. Pada pertengahan tahun 1999, aktivis gerakan reformasi muncul kembali dengan berselindung di sebalik platform sebuah parti politik di mana sebilangan daripada mereka telah menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu-isu keagamaan dan perkauman. Ini termasuk penyebaran berita-berita palsu yang menggemparkan seperti dakwaan bahawa ramai orang Melayu telah dikristiankan semasa Pilihanraya Kecil Lunas. Ciri-ciri militan semasa Pilihanraya Kecil itu telah juga dilakukan oleh aktivis reformasi melalui perbuatan ganas dengan mengancam, mengugut dan menakutkan-nakutkan para pengundi serta orang ramai. *e*
5. Pada akhir tahun 2000 aktivis reformasi telah membuat ketetapan untuk menggunakan dua pendekatan berikut bagi mencapai matlamat mereka: *f*
- 5.1. Akan terus melibatkan diri dalam proses demonstrasi yang normal serta sistem pilihanraya; dan
- 5.2. Melalui cara-cara di luar perlembagaan dengan mencetuskan demonstrasi jalanan secara besar-besaran dan bercorak militan menjelang Pilihanraya Umum 2004. *g*
6. Ke arah merealisasikan perancangan tersebut, satu kumpulan sulit yang dianggotai oleh lebih kurang 20 orang aktivis reformasi telah diwujudkan di KUALA LUMPUR. Sejak 6 JAN 2001 hingga 4 APR 2001, sebanyak 12 perjumpaan sulit telah diadakan oleh kumpulan ini bagi merancang untuk mempengaruhi rakyat membudayakan demonstrasi jalanan dan perhimpunan kaum secara militan. Antara perancangan terpenting gerakan reformasi dalam masa yang terdekat ini adalah untuk menganjurkan demonstrasi jalanan yang dipanggil "Black 14" secara besar-besaran di KUALA LUMPUR pada 14 APR *h*
- i*

- a** 2001. Bagi mengelirukan pihak keselamatan, perhimpunan tersebut dipanggil 'Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia' di mana mereka merancang untuk mengumpulkan seramai lebih kurang 50,000 orang yang akan berhimpun di sekitar Kuala Lumpur. Perhimpunan serta perarakan ini berpotensi menjadi rusuhan.
- b** 7. Adalah jelas aktivis reformasi sanggup melaksanakan kegiatan-kegiatan di luar perlembagaan dan undang-undang demi mencapai matlamat mereka. Oleh itu tindakan di bawah sek 73(1) AKDN 1960 diambil kerana pihak Polis mempercayai ada alasan-alasan untuk menahan mereka di bawah Sek 8 AKDN 1960 kerana telah bertindak dengan cara yang memudaratkan keselamatan negara.
- c** On 13 April 2001 five of the persons detained, namely, Mohamad Ezam bin Mohd Nor ("the applicant"), Chua Tian Chang, Hishamuddin Rais, Saari bin Sungib and Raja Petra bin Raja Kamaruddin filed a motion for the issue of a writ of *habeas corpus* to secure their release. At the hearing of the motion
- d** before me it was agreed by the parties that arguments will be based on the motion of the applicant with the result binding on the other motions.
- The motion of the applicant was supported by an affidavit affirmed by his wife, Bahirah binti Tajul Aris, the material parts of which read as follows:
- e** Saya, Bahirah binti Tajul Aris (No KP 701229-10-5428) seorang warganegara Malaysia yang beralamat di No 24 Jalan SS7/24, Kelana Jaya, 47301 Petaling Jaya, Selangor Darul Ehsan cukup umur, dengan sesungguhnya berikrar dan menyatakan seperti berikut:-
1. Saya adalah isteri kepada Pemohon yang dinamakan di atas.
- f** 2. Saya mempunyai pengetahuan berkenaan fakta-fakta dan keadaan-keadaan berhubung dengan perkara ini kecuali di mana dinyatakan sebaliknya.
3. Responden adalah Ketua Polis Negara, Malaysia.
- g** 4. Saya telah membaca di surat khabar-surat khabar bertarikh 11hb April 2001 bahawa suami saya Mohamad Ezam Mohd Nor telah ditangkap oleh pengkhidmat Responden di bawah Akta Keselamatan Dalam Negeri. Ini telah disahkan oleh kenyataan akhbar oleh Responden yang dibuat pada hari Rabu, 11hb April 2001.
- h** 5. Saya membuat afidavit ini bagi pihak Pemohon kerana beliau adalah dalam tahanan dan tidak dapat mengikrar dan memfailkan afidavitnya sendiri.
6. Saya tidak mengetahui tempat di mana Pemohon ditahan.
- i** 7. Saya telah pergi ke Bukit Aman pada pagi hari Rabu 11hb April 2001 dan telah membuat pertanyaan kepada wakil Responden DSP Joon tentang tempat tahanan Pemohon namun tidak diberitahu tempat tahanan tersebut.

8. Saya juga telah pergi ke Bukit Aman pada pagi hari Rabu 11hb April 2001 dan telah membuat permintaan kepada wakil Responden DSP Joon supaya diberi peluang berjumpa dengan orang tahanan untuk memastikan keselamatan beliau dan juga supaya orang tahanan diberi peluang untuk berjumpa dengan peguam beliau. Saya diberitahu oleh wakil Responden bahawa semua orang tahanan tidak akan dibenarkan berjumpa dengan peguam dan bahawa lawatan oleh keluarga tidak akan dibenarkan buat masa sekarang. *a*
9. Saya telah arahkan peguamcara Tetuan Daim & Gamany untuk menulis kepada Responden untuk meminta berjumpa dengan Pemohon. Sesalinan benar surat tersebut bertarikh 12.3.2001 sekarang ditunjuk kepada saya dan bertanda "BTA-1". *b*
- Sehingga sekarang, tidak ada sebarang jawapan daripada pihak Responden. *c*
10. Saya telah mendapat maklumat daripada laporan-laporan yang dibuat oleh pertubuhan hak-asasi tentang keadaan di dalam tahanan seperti berikut:- *d*
- a. tahanan ISA ditahan dalam bilik-bilik asingan (solitary confinement) dan tidak dibenarkan berhubung dengan orang lain kecuali pegawai polis;
 - b. hak untuk berhubung dengan peguam dan keluarga, dan untuk menerima bahan membaca, yang diberikan di bawah Kaedah-Kaedah Lokap L.N. 328/1958 tidak dipatuhi'; *e*
 - c. orang tahanan disoalsiasat dalam keadaan yang (oppressive) untuk masa yang terlalu panjang dan berterusan;
 - d. orang tahanan diseksa secara mental dan fizikal dalam proses soal-siasat. *f*
- Ekoran dari maklumat ini, saya bimbang tentang keselamatan Pemohon dan percaya dengan sesungguhnya bahawa lawatan oleh keluarga dan peguam kepada Pemohon adalah perlu untuk memastikan bahawa beliau adalah dalam keadaan selamat.
11. Saya diberi sesalinan akhbar bertarikh 11 April 2001 bertajuk "Kenyataan Akhbar Mengenai Penangkapan di bawah Akta Keselamatan Dalam Negeri (AKDN) 1960" yang dikeluarkan oleh Responden kononnya sebagai alasan untuk tangkapan dan tahanan Pemohon dan enam orang lain. Sesalinan benar kenyataan akhbar tersebut ditunjuk kepada saya bertanda "BTA-2". *g*
12. Kenyataan akhbar itu menuduh bahawa Pemohon terlibat dalam kegiatan yang boleh memudaratkan keselamatan negara dan telah bertindak secara militan dengan mengambil pendekatan seperti berikut:- *h*
- a. telah melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan "grenade launcher"; *i*

- a* b. menggunakan ‘Molotov cocktail’, ‘ball bearing’ serta berbagai-bagai senjata berbahaya untuk menyerang pihak keselamatan bagi menimbulkan keadaan huru hara semasa demonstrasi jalanan di sekitar Kuala Lumpur pada bulan OKT 1998; dan
- b* c. mendapatkan bantuan dan sokongan guru-guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan serta menyertai gerakan mereka.
- Kenyataan akhbar juga menuduh bahawa Pemohon telah menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu keagamaan dan perkauman.
- c* 13. Saya berkata bahawa semua pengataan-pengataan ini dan tuduhan-tuduhan lain dalam Eksibit “BTA-2” adalah tidak benar dan adalah pembohongan yang dibuat oleh pihak Responden dengan niat *mala fide* yang bermotif politik. Pendirian saya disokong oleh kenyataan akhbar oleh Presiden Parti Rakyat Malaysia Dr Syed Husin Ali bertarikh 11 April 2001 bertajuk “Police tell lies to save Prime Minister”. Sesalanan benar kenyataan akhbar tersebut ditunjuk kepada saya bertanda “BTA-3”.
- d*
- e* 14. Di dalam kenyataan akhbar oleh pihak Responden, juga disebut bahawa Pemohon telah merancang perhimpunan haram yang militan pada 14 April 2001. Ini juga ada satu pembohongan. Saya telah diberi surat-suratan di antara Jawatankuasa Memorandum Rakyat 14 April dan pihak SUHAKAM (Suruhanjaya Hak Asasi Manusia Malaysia) di mana adalah jelas bahawa perhimpunan itu bertujuan untuk menghantar satu memorandum kepada SUHAKAM. Jawatankuasa itu telah secara telus dan bersopan telah mengatitkan satu appointment dengan SUHAKAM untuk penyerahan itu. Sesalanan benar surat-suratan ini bertarikh 30 Mac dan 11 April ditunjuk kepada saya bertanda “BTA-4”.
- f*
- g* 15. Pihak SUHAKAM telah juga mendesak bahawa semua tahanan termasuk Pemohon dibebaskan dengan serta merta tanpa syarat dan sekiranya disyakki melakukan apa-apa kesalahan undang-undang, dituduh di Mahkamah yang sesuai. Sesalanan surat dari SUHAKAM tersebut bertarikh 11.4.2001 ditunjukkan kepada saya bertanda “BTA-5”.
- h*
- i* 16. Saya dinasihati oleh peguamcara saya dan Pemohon, Tetuan Daim dan Gamany, bahawa tangkapan Pemohon pada mulanya dan/atau penahanannya kini dan berterusan adalah tidak sah dan salah di sisi undang-undang serta *mala fide* atas alas alasan yang berikut:-
- a.* Pencabulan hak Pemohon di bawah Perkara 5(3) Perlembagaan Persekutuan iaitu keengganan Responden atau pengkhidmat Responden untuk membenarkan Pemohon berjumpa dengan peguam dan/atau ahli keluarga adalah berjumlah kepada penindasan dan penafian hak Pemohon untuk memastikan samada sebab-sebab penangkapan beliau telah dijelaskan dengan tepat semasa tangkapan dan/atau di dalam Perintah Tahanan, dan sekaligus menafikan hak beliau untuk mencabar kesahihan tangkapan beliau.

- b. Pencabulan hak Pemohon di bawah Perkara 5(2) Perlembagaan Persekutuan. *a*
- c. Tangkapan dan penahanan Pemohon telah melanggar undang-undang, adalah tidak rasional (irrational), satu tindakan yang sewenang-wenang (arbitrary) dan tidak munasabah (unreasonable).
- d. Tangkapan dan penahanan Pemohon adalah mala fide dan bermotif politik. *b*

17. Maka, saya dengan segala hormatnya memohon suatu perintah seperti yang dipohon di dalam perenggan 1 dalam notis usul atau apa-apa perintah lain atau selanjutnya yang difikir patut dan wajar oleh Mahkamah yang Mulia ini. *c*

The respondent himself affirmed two affidavits. The material parts of his first affidavit read as follows:

Saya, Tan Sri Norian bin Mai, Nombor Polis G/5189, seorang warganegara Malaysia yang cukup umur dan beralamat di No. 19 Jalan Terusan, Seksyen 8/26, 84000 Shah Alam, Selangor dengan sesungguhnya berikrar dan menyatakan seperti berikut:- *d*

1. Saya adalah Ketua Polis Negara bertugas di Ibu Pejabat Polis Bukit Aman, Kuala Lumpur.
 2. Saya berhak membuat affidavit ini dan mempunyai pengetahuan berkenaan fakta-fakta dan keadaan-keadaan berhubung dengan perkara ini kecuali di mana dinyatakan sebaliknya. *e*
 3. Saya merujuk kepada affidavit Puan Bahirah bt Tajul Aris yang diikrarkan pada 12/4/01 (kemudian ini dirujuk sebagai "Affidavit Bahirah") berkaitan dengan tahanan bernama Mohamad Ezam Mohd Nor (kemudian ini dirujuk sebagai "Pemohon") dan mengatakan bahawa daripada maklumat yang diterima berhubung dengan kegiatan Pemohon, saya mempunyai sebab-sebab untuk mempercayai bahawa terdapat alasan-alasan yang boleh mewajarkan Pemohon ditahan di bawah Seksyen 8 Akta Keselamatan Dalam Negeri 1960 kerana Pemohon telah bertindak dengan cara yang boleh memudaratkan keselamatan Malaysia. *f*
 4. Saya merujuk kepada perenggan 10 Affidavit Bahirah dan saya menyatakan bahawa perkara-perkara yang dinyatakan di perenggan itu tidak merujuk secara khusus terhadap tahanan Pemohon dan merupakan dengar cakap (hearsay). *g*
 5. Saya mengesahkan bahawa saya telah membuat kenyataan akhbar mengenai penangkapan di bawah Akta Keselamatan Dalam Negeri 1960 berkaitan dengan tangkapan Pemohon dan enam orang yang lain pada 11/4/2001. Kenyataan akhbar saya adalah seperti dilampirkan di dalam Affidavit Bahirah dan ditanda sebagai eksibit "BTA-2". *h*
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- a* 6. Saya merujuk kepada perenggan 12 Afidavit Bahirah dan saya menyatakan bahawa kegiatan-kegiatan yang dimaksudkan itu tidak merujuk secara khusus kepada Pemohon tetapi merujuk kepada “Gerakan Reformasi” yang mana Pemohon adalah seorang ahli aktivis gerakan berkenaan.
- b* 7. Saya menafikan segala dakwaan-dakwaan yang terkandung di dalam perenggan 13 Afidavit Bahirah dan menyatakan bahawa penangkapan Pemohon bukan berniat *mala fide* yang bermotif politik tetapi adalah berkaitan dengan kegiatan Pemohon yang boleh menggugat keselamatan negara.
- c* 8. Dakwaan-dakwaan yang terkandung di dalam perenggan 14 Afidavit Bahirah adalah tidak benar dan dinafikan. Saya dengan sesungguhnya mempercayai bahawa perkara-perkara yang didakwakan olehnya adalah di luar pengetahuannya dan selanjutnya saya mengulangi apa yang saya telah katakan di dalam perenggan 6 kenyataan akhbar saya yang bertarikh 11/4/01.
- d* 9. Saya mengambil maklum tentang perenggan 15 Afidavit Bahirah dan menyatakan bahawa penangkapan Pemohon adalah di bawah undang-undang pencegahan di mana pihak polis diberi kuasa untuk mengambil tindakan.
- e* 10. Semua pengatahan-pengatahan di dalam Perenggan 16 adalah dinafikan dan saya dengan sesungguhnya mempercayai bahawa tangkapan dan penahanan Pemohon adalah sah kerana telah dibuat menurut peruntukan undang-undang. Oleh yang demikian saya memohon supaya permohonan Pemohon ditolak.

The material parts of his further affidavit read as follows:

- f* Saya, Tan Sri Norian bin Mai, Nombor Polis G/5189, seorang warganegara Malaysia yang cukup umur dan beralamat di No. 19 Jalan Terusan, Seksyen 8/26, 84000 Shah Alam, Selangor dengan sesungguhnya berikrar dan menyatakan seperti berikut:-
- g* 1. Saya adalah Ketua Polis Negara bertugas di Ibu Pejabat Polis Bukit Aman, Kuala Lumpur.
- h* 2. Saya berhak membuat affidavit ini dan mempunyai pengetahuan berkenaan fakta-fakta dan keadaan-keadaan berhubung dengan perkara ini kecuali di mana dinyatakan sebaliknya.
- i* 3. Saya merujuk kepada Afidavit Jawapan saya yang diikrarkan pada 15.4.2001 dan difailkan pada 16.4.2001 saya sesungguhnya menyatakan daripada maklumat yang diterima berhubung dengan kegiatan orang tahanan bernama MOHAMAD EZAM MOHD. NOR (selepas ini disebut sebagai “Pemohon”) saya mempunyai sebab-sebab untuk mempercayai bahawa terdapat alasan-alasan yang boleh mewajarkan Pemohon ditahan di bawah seksyen 8 Akta Keselamatan Dalam Negeri 1960 (Akta 82).
4. Saya mempercayai bahawa butir-butir maklumat yang diterima dan siasatan terperinci yang sedang dijalankan berhubung kegiatan-kegiatan Pemohon selain daripada maklumat yang dinyatakan di dalam kenyataan

akhbar saya yang bertarikh 11.4.2001, tidak boleh diberitahu dan didedahkan kerana saya mempunyai sebab untuk mempercayai bahawa dengan berbuat demikian ia adalah bertentangan dengan kepentingan keselamatan Malaysia. a

I shall refer to other affidavits filed on behalf of the respondent in the course of the judgment. b

Application To Disqualify

At the commencement of the proceedings En. Sivarasa, one of the counsel for the applicant, urged me to consider whether I should recuse myself from hearing this case. In substance his application was grounded on the fact that I was the judge who heard the case involving Dato' Seri Anwar bin Ibrahim, the conviction and sentence of which was handed down on 14 April 1999 (see *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215). This is the date that is referred to as "Black 14" in the press statement of the respondent. He said that the conviction and sentence was the subject matter of strong public criticism including the Bar Council. He added that although there is no assertion of actual bias there may be a perception of bias as the facts are in the public domain. In opposing the application Dato' Abdul Gani Patail, Senior Deputy Public Prosecutor, said that the press statement of the respondent does not refer to the judgment of 14 April. He then said that the date does not refer to a criticism of the judgment. He explained that the reformasi movement has nothing to do with 14 April as it started in 1998. It is a bigger concept than "Black 14". He concluded by saying that the test of disqualification of a judge from hearing a case is the perception of a reasonable man. c
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It is indeed bizzare that the date on which a judgment is delivered can develop into the focal point of a disqualification exercise. A judge in deciding a case is merely carrying out a constitutional function entrusted upon him by the Yang di-Pertuan Agong. The decision made is based on admissible evidence and the arguments advanced by the parties. A judge has no interest in the outcome of his judgment. Any attempt made to hold a judgment against the decider whether directly or indirectly, explicitly or implicitly or even dressed and fashioned as a perception will strike at the very core of the administration of justice and lead to the destruction of the independence of the judiciary. As Iyer's *Law of Contempt of Courts* says at p. 683: f
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By the very nature of his work a Judge has to decide matters against one or other of the parties. If the fact that he renders a decision which is resented by a litigant or his lawyer were to expose him to such risk, it will sound the death knell of the institution. h
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a As observed by Wilmot J in *R v. Almon* [1765] Wilm 243 at p. 255:

The arraignment of the justice of the judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in his choice of his judges and, excites in the mind of his people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the law is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice ...

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In fact questioning the competence of a judge to hear a particular case on account of his standing in the judicial hierarchy amounts to casting an aspersion on the appointing authority (see *Devi & Ors v. State* [1963] 1 Cri LJ 543). It is the bounden duty of all concerned including the Bar Council to protect the judiciary from such onslaughts. Be that as it may, fair criticism of a judgment is a part of the judicial process. A court cannot claim to be always right and must accept criticisms. As Hidayatullah CJ said in *RC Cooper v. Union of India* [1970] 2 SCC 298 at p. 301:

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There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them it is so far error. No one is more conscious of his limitations and fallibility than a Judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others. We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or Courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts, is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of Courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril.

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A criticism can be said to be fair, even if wrong, if it is based on a legal analysis of the issues decided in a case. It is superfluous to state that this necessitates a perusal of the judgment. Sadly, criticisms of judgments are not fair in all cases. In some cases they may be done without a perusal of the judgment and may even be made for an improper motive. A criticism cannot be fair when it is built upon facts which are not truly stated (see *CS Appa v. MP Maricar* AIR [1918] LB 36 (2)). It will also be so when it is based mostly on surmises or unauthorised versions furnished by interested parties. It must be observed that in politically-charged cases criticisms are inevitable. In such cases the need for self-preservation and maintenance of popular support

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overshadow all other interests. Thus in such instances, as stated by a judge of the United States Supreme Court in the course of hearing the recent Bush-Gore post election legal dispute which was preceded by attacks on the judiciary, the ultimate loser is the court. It is the ability of the court to withstand such attacks that makes it truly independent. a

The category of criticism into which the judgment delivered on 14 April falls is not for me to analyse especially when particulars were not furnished to me and more so when it is pending appeal in the Federal Court. In any event as observed in Iyer's *Law of Contempt of Courts* at p. 172: b

It should be well to remember that the Judges by reason of their office are precluded from entering into any controversy in the columns of the public press, nor can enter the arena and do battle upon equal terms in newspapers, as can be done by ordinary citizens. c

“Black 14” is undoubtedly a date to commemorate the delivery of the judgment on 14 April. It has nothing to do with the merits or demerits of the judgment that was delivered. The proper test to be applied in the application made before me, as I intimated to learned counsel, is this: If I were to dismiss the applications pending hearing would a reasonable person conclude that I am anti-reformasi? There was no response to this question from learned counsel. If the answer to the test is in the affirmative it is appropriate that I recuse myself from hearing the case. Such a perception can be said to be reasonable if, in my judgment of 14 April, I had made unnecessary comments on the reformasi movement. A perusal of the judgment will reveal that there is absolutely no reference whatsoever to the movement in the judgment. In the premises I was satisfied that the application made before me was frivolous, vexatious and an abuse of the process of the court. Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact it would be a gross dereliction of duty for a judge to disqualify himself when there are no grounds. Accordingly, I dismissed the application. d

I then proceeded to hear the submissions of both parties which, I must say, was done in a polite and professional manner. I shall now consider the arguments advanced before me. I find that it is not necessary for me to expound my views on the law relating to preventive detention as it has been adequately dealt with by the highest court in the land through the minds of legal luminaries such as Suffian LP and Salleh Abas LP. e

The Law

Preventive detention is not new and unique nor peculiar to Malaysia. As Lord Atkinson said in *R v. Halliday* [1917] AC 260 at p. 273: f

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- a** Preventive justice as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing to the laws of England.
- b** In appreciating the law contained in the ISA it is appropriate to bear in mind the fact that the judges in the matter of preventive detentions relating to the security of Malaysia are the executive (see *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293). The judicial process is unsuitable for reaching decisions on national security (see *Council of Civil Service Unions and others v. Minister for the Civil Service* [1984] 3 All ER 935). As Lord Parker said in *The Zamora* [1916] 2 AC 77 at p. 107:
- c** Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public.
- d** It is therefore not the function of the court to act as a Court of Appeal from the discretionary decision of the executive and to inquire into the grounds upon which they came to the belief that it was necessary or desirable in the interests of the security of Malaysia to hold a person in detention (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129). Thus the role of
- e** the courts in such matters is limited as made clear by decided cases. Section 73(1) of the ISA deals with the power of the police to arrest and detain persons who come within the subsection. Section 8(1) of the ISA deals with the ministerial power to issue an order of detention. The test to determine the validity of a detention order made under s. 8(1) of the ISA is subjective (see
- f** *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129). As s. 73(1) and s. 8(1) of the ISA are so inextricably connected, the subjective text should be applied to both (see *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182). The result is that the court cannot require a police officer to prove to the court the sufficiency of the reason for his belief
- g** under s. 73(1) of the ISA. As Suffian FJ (as he then was) said in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 at p. 150:
- ... when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it
- h** would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation.
- In commenting on the case that I have just referred to Edgar Joseph Jr J (as he then was) said in *Athappan a/l Arumugan v. Menteri Hal Ehwal Dalam*
- i** *Negeri, Malaysia & Ors* [1984] 1 MLJ 67 at p. 69:

In my opinion, as Suffian FJ had made it clear that he was deciding the case on more than one ground, each proposition on which he based his decision may be rightly regarded as the *ratio decidendi* of his judgment. **a**

Accordingly, the proposition that the subjective satisfaction of the Minister in cases of preventive detention is not justiciable, qualifies as one of the *ratio decidendi* of his judgment. **b**

The court may however examine the sufficiency of the reasons for detention under s. 73(1) of the ISA in certain circumstances which I shall consider in the succeeding paragraph. Be that as it may, the subjective nature of the reasons for detention does not mean that an order of detention cannot be challenged. It can be challenged on the ground that it was made *mala fide*. Thus in commenting on the burden of proof upon a challenge made to an order of detention Salleh Abas LP said in *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 at p. 186: **c**

Where a person who has been deprived of his liberty challenges the detention it is for the authorities to show that the person has been detained in exercise of a valid power. **d**

Once that is shown it is for the detainee to show that the power has been exercised *mala fide* or improperly, which means that it is made for a “collateral” or “ulterior” purpose, that is to say, a purpose other than those set out in art. 149 of the Federal Constitution, and in this case for a purpose other than for preventing the detainee from doing acts prejudicial to the security of Malaysia (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129). As Ali FJ said in the same case at p. 157: **e**

In my opinion, *mala fide* is accepted as a good ground for challenging the validity of an order of detention because it suggests an abuse of power. Being a question of fact it has to be proved and in cases of this nature it is not always easy to prove it. **f**

The burden is shifted to the detainee because s. 73(7) of the ISA provides that a person detained pursuant to the powers conferred shall be deemed to be in lawful custody. **g**

With regard to the obligation of a police officer or the Minister to disclose facts in connection with a detention s. 16 of the ISA and art. 151(3) of the Federal Constitution provide that they cannot be required to furnish facts whose disclosure would in their opinion be against the national interest. Both the provisions read as follows: **h**

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a Section 16 Of The ISA

Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.

b

Article 151(3) of the Federal Constitution

This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

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The scope of s. 16 is not limited to Chapter II where it appears but also extends to s. 73(1) which is in Chapter VI of the ISA (see *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293). Since the right of non-disclosure applies only to facts whose disclosure would be against the national interest there can be disclosure of facts which are not against such interest. As the right is that of the authority concerned it may, in an appropriate

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case, waive the right. It follows that in a particular case there can be partial disclosure and partial non-disclosure of facts. Needless to say, the right of partial disclosure is for the detaining authority to decide. It is the right of non-disclosure that makes the test under s. 8(1) and s. 73(1) of the ISA a subjective

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one as in the absence of any disclosure the court would be in no position to make a ruling on the validity of the arrest and detention. I shall now return to the circumstance in which the court may examine the sufficiency of the reasons for detention under s. 73(1) of the ISA to which I had made reference in the preceding paragraph. It arises when the facts of a case are furnished

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voluntarily, exhaustively and in great detail by the detaining authority for the consideration of the court in which event the court may make its own evaluation and assessment to come to a reasonable conclusion (see *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182). The right to make an evaluation in such circumstances means that the test would be an objective

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one. It is superfluous to state that this procedure cannot be resorted to if the facts furnished voluntarily are not exhaustive and are not in great detail. In other words the police must have disclosed all material facts in their possession. In any event the disclosure must be unqualified. Thus if the detaining authority has made a partial disclosure with a right of non-disclosure asserted over the other part this procedure will be of no avail with the result

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that the test to determine the validity of the arrest and detention will be the subjective one. In that event the detainee must show that the detention is *mala fide*. At the end of the judgment I shall consider the applicability of s. 8B(1) to s. 73(1) of the ISA as an alternative answer to the remedy sought by the applicant.

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Whether The Respondent Has Discharged The Burden To Show That The Applicant Has Been Detained In The Exercise Of A Valid Legal Power *a*

The right of a police officer to arrest and detain a person is contained in s. 73(1) and (3) of the ISA which read as follows:

(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe – *b*

(a) that there are grounds which would justify his detention under section 8; and

(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. *c*

(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8: *d*

Provided that –

(a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and *e*

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister. *f*

In order to discharge the burden to show that the applicant was arrested and detained in the exercise of a valid legal power the respondent filed three affidavits. The first affidavit was affirmed by Ahmad Ramdzan bin Daud (“the arresting officer”), an Assistant Superintendent of Police attached to the Special Branch, Police Headquarters, Bukit Aman, Kuala Lumpur. He deposed in para. 6 of his affidavit that on 10 April 2001 at 4.35pm he led a police party to arrest the applicant at Terminal 3, Sultan Abdul Aziz Shah Airport, Subang, Selangor. The material parts of his affidavit then go on to state as follows: *g*

4. Saya dengan sesungguhnya menyatakan daripada maklumat yang diterima berhubung dengan kegiatan orang tahanan bernama MOHAMAD EZAM MOHD NOR (selepas ini disebut sebagai ‘Pemohon’). Saya mempunyai sebab-sebab untuk mempercayai bahawa terdapat alasan-alasan yang boleh mewajarkan Pemohon ditahan di bawah Seksyen 8 Akta Keselamatan Dalam Negeri, 1960 (Akta 82). *i*

- a* 5. Saya juga sesungguhnya mempercayai Pemohon telah bertindak dengan cara yang boleh memudaratkan keselamatan negara.
7. Sebaik sahaja saya menangkap Pemohon, saya telah memberitahu dan menerangkan kepada Pemohon dalam bahasa Melayu yang mudah sebab-sebab Pemohon ditangkap. Saya sesungguhnya mempercayai Pemohon telah memahami penerangan saya.
- b*
8. Pada masa tangkapan, saya tidak memberitahu butir-butir maklumat yang diterima dan siasatan yang dijalankan berhubung kegiatan-kegiatan Pemohon kerana saya mempunyai sebab mempercayai bahawa dengan berbuat demikian ia adalah bertentangan dengan kepentingan keselamatan Malaysia. Saya kemudiannya telah menahan Pemohon untuk tujuan penyiasatan lanjut di bawah Akta Keselamatan Dalam Negeri, 1960 (Akta 82).
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The other two affidavits relate to the authority of the police to detain the applicant. One was affirmed by Wong Lang Eng, an inspector attached to the special branch, Police Headquarters, Bukit Aman, Kuala Lumpur. The material parts of her affidavit read as follows:

- d*
3. Pada 11.4.2001, jam 2.00 petang, saya telah memberi kuasa penahanan ke atas orang tahanan bernama MOHAMAD EZAM BIN MOHD NOR K.P. 670424-10-6267 (selepas ini disebut sebagai 'Pemohon') dilanjutkan melebihi 24 jam lagi mulai 11.4.2001 jam 4.35 petang, satu kuasa yang diberikan kepada saya di bawah peruntukan Seksyen 73(3)(a) Akta Keselamatan Dalam Negeri, 1960 bagi tujuan meneruskan siasatan terhadap pemohon.
- e*
4. Satu salinan Borang SB. Form 28A (Revised) yang memberi kuasa untuk penahanan lanjutan ke atas pemohon di bawah peruntukan Seksyen 73(3)(a) Akta Keselamatan Negeri 1960 yang telah disahkan oleh Superintenden Polis SHAMSUDDIN B. HJ. ARSHAD, Nombor Polis G/5199, seorang Pegawai Kanan Polis yang memegang jawatan sebagai Pegawai Turus E6B di Cawangan Khas, Ibu Pejabat Polis DiRaja Malaysia, Bukit Aman, Kuala Lumpur yang mempunyai di dalam jagaannya dokumen tersebut, dilampirkan sebagai eksibit 'WLE-1'.
- f*
- g* The material part of the exh. "WLE-1" referred to in para. 4 of the affidavit reads as follows:
- Whereas I, WONG LANG ENG INSPECTOR of Police, of Police Headquarters BUKIT AMAN am satisfied with regard to the case of MOHAMAD EZAM BIN MOHD NOR NRIC No 670424-10-6267 who was arrested under Section 73(1) of the Internal Security Act, 1960 on 10 APR 2001 @ 1635 Hrs in TERMINAL 3, SUBANG AIRPORT, SUBANG, SELANGOR that the necessary enquiries cannot be completed within the period of 24 hours, now therefore, in exercise of the powers vested in me by Section 73(3)(a) of the Internal Security Act, 1960, I hereby authorise the further detention of the above named MOHAMAD EZAM BIN MOHD NOR for an additional period of 24 hours with effect from 11 APR 2001 @ 1635 Hrs.
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- a* whom he has reason to believe ...” in s. 73(1) of the ISA require a consideration of the provisions (a) and (b) of the subsection while there is no such requirement in s. 73(3) of the ISA.

- In my view the objection raised by En. Kamarul Hisham cannot be sustained.
- b* With regard to the first objection it is my view that it is based on a misreading of s. 73(1)(a) of the ISA. Its reference to s. 8 of the ISA is only to the “grounds” which would justify a detention. The grounds of detention are the reasons for which an order of detention is made. What is further set out in s. 8 of the ISA is the purpose for which an order of detention may be made (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129). This is specifically required by s. 73(1)(b) of the ISA. It is therefore sufficient if it is stated, as required by s. 73(1)(a) of the ISA, that there are grounds which would justify a detention under s. 8 of the ISA. Pursuant to s. 73(1)(b) of the ISA the specific purpose of detention must be identified. A setting out in full of the language in s. 8(1) of the ISA would be fatal as it would result in the specific purpose of detention being not identified and would also render s. 73(1)(b) superfluous. A more pertinent matter for consideration is whether the arresting officer must set out the grounds for his belief in effecting the arrest. Article 151(3) of the Federal Constitution and s. 16 of the ISA allow the arresting officer to decline to disclose the grounds of his belief which was done in this case. This procedure was recognised in *Re Ong Yew Teck* [1960] MLJ 67 which was adopted by the (then) Supreme Court in *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182. As Salleh Abas LP said in the latter case at p. 187:
- c*
- d*
- e*

- f* In simple language, what section 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person’s detention under section 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code defines ‘reason to believe’ to mean ‘sufficient cause to believe’. Who then is to decide what is sufficient cause under section 73(1) of the Act? That is the cruz of the matter.
- g*

We hold that since section 73(1) and section 8 of the Act are so inextricably connected, the subjective test should be applied to both. The Court cannot require the police officer to prove to the Court the sufficiency of the reason for his belief under section 73(1).

- h* Thus there is no requirement for the arresting officer to set out the reasons for his belief in effecting the arrest. With regard to the second objection there is no express stipulation in s. 73(3) of the ISA for the officer authorising the detention to be satisfied with the requirements of s. 73(1)(a) and (b) of the ISA as in the case of the arresting officer. That of course does not mean that
- i* an officer authorising a detention may do so automatically without any

consideration of the need to authorise the detention. He must be satisfied that there are reasons to justify the detention. This in effect means that he must be satisfied with the requirements of s. 73(1)(a) and (b) of the ISA. However, he need not disclose the reasons. Any disclosure of the reasons would violate the right conferred by s. 16 of the Act and art. 151(3) of the Federal Constitution which the arresting officer has asserted in this case.

I shall now consider whether the applicant has been arrested and detained in the exercise of a valid power. Paragraphs 4 and 5 of the affidavit of the arresting officer show that he has complied with the requirements of s. 73(1)(a) and (b) of the ISA in effecting the arrest and detention of the applicant. The two further affidavits that I have referred to show that the requirements of s. 73(3)(a) and (b) have been complied with in authorising the further detention of the applicant. Both the detention orders that I have reproduced earlier show that the officers concerned have applied their mind in authorising the detention. The reference in both the detention orders to "... am satisfied with regard to the case of MOHAMAD EZAM BIN MOHD NOR NRIC NO 670424-10-6267 who was arrested under s. 73(1) ... that the necessary enquiries cannot be completed ..." show satisfaction with the necessary requirements. I am therefore of the view that the applicant has been arrested and detained in the exercise of a valid legal power.

Whether The Applicant Has Discharged The Burden On Him To Show That The Detention Is Unlawful

As the respondent has discharged the burden on him the burden is now on the applicant to show that the detention is unlawful. Since the respondent has made certain disclosures in the press statement issued by him I will first consider whether the facts disclosed are sufficient to enable me to conduct an objective test on the validity of the arrest and detention of the applicant. As I said earlier an objective assessment and evaluation of the press statement can be done if it is voluntary, exhaustive and in great detail. That the press statement is voluntary cannot be disputed and, in fact, is not disputed by the respondent. A matter of concern is whether it is exhaustive and in great detail. If it is not exhaustive and in great detail by virtue of certain facts being withheld from the purview of the court then the court will be unable to conduct an objective evaluation and assessment of the facts for the simple reason that not all the facts would be before the court. In that event the applicable test will be subjective and the validity of the arrest and detention of the applicant cannot be impugned.

In arguing that the press statement does not amount to an exhaustive and detailed disclosure Dato' Abdul Ghani Patail referred to its para. 2 which states that the applicant and the others were arrested and detained because there was

- a** information pertaining to their involvement in activities that may endanger the security of the country. It goes on to say that the police need to carry out a thorough investigation on the information. He said that what appears thereafter in the press statement is a reference to the reformasi movement in general and not to the persons detained. He then referred to para. 4 of the further affidavit of the respondent which reads as follows:
- b**

- c** Saya mempercayai bahawa butir-butir maklumat yang diterima dan siasatan terperinci yang sedang dijalankan berhubung kegiatan-kegiatan Pemohon selain daripada maklumat yang dinyatakan di dalam kenyataan akhbar saya yang bertarikh 11.4.2001, tidak boleh diberitahu dan didedahkan kerana saya mempunyai sebab untuk mempercayai bahawa dengan berbuat demikian ia adalah bertentangan dengan kepentingan keselamatan Malaysia.

- He added that some of the facts were disclosed by the respondent in the public interest and to show transparency and that the respondent must be commended for having taken these factors into consideration. In his reply En. Zainur Zakaria, leading counsel for the applicant, contended, *inter alia*, that the existence of other reasons ought to have been mentioned in the press statement. He added that the references in the press statement to the reformasi movement and its activities are a reference to the persons detained as they are part of the movement. He also submitted that the two affidavits affirmed by the respondent are contradictory in that while he had asserted in the first affidavit that the allegations made in the press statement do not refer specifically to the persons detained yet in the further affidavit he says that there are other reasons in connection with the detention which cannot be disclosed.
- d**
- e**

- f** A consideration of the exhaustiveness of the press statement must commence with para. 8 of the affidavit affirmed by the arresting officer where he affirmed that at the time of the arrest of the applicant he did not disclose the information received and investigations being carried out in connection with the activities of the applicant as he believed that such disclosure would be against the national security of Malaysia. This, needless to say, is in accordance with the right conferred on him by s. 16 of the ISA and art. 151(3) of the Federal Constitution. It is after the assertion of this right by the arresting officer that the respondent made the press statement. In the first two sentences of para. 2 of the press statement the respondent referred to information relating to the involvement of the seven persons who were detained in activities that may endanger the security of the country. He went on to say that the police need to carry out a thorough investigation on the information. What then follows is a general description of the activities of the reformasi movement. This may or may not refer to the persons detained. In determining whether paras. 2.1, 2.2 and 2.3 refer to the persons detained a reference to para. 3 is necessary. It states that to curb the militant trend of the reformasi movement
- g**
- h**
- i**

the police took action on 28 reformasi activists under s. 73(1) of the ISA between 20 September 1998 and 24 December 1998. In the absence of evidence to show that the persons currently detained were part of the 28 persons detained in 1998 the averment by the respondent in para. 6 of his first affidavit that paras. 2.1, 2.2 and 2.3 of the press statement do not refer specifically to the applicant and the other detained persons but to the reformasi movement in general can be accepted as being logical and accurate. The remaining parts of the press statement are general in nature. Be that as it may, the first two sentences of para. 2 of the press statement show in clear terms that the police must carry out a thorough investigation on the activities of the persons detained. Thus even if the facts disclosed in the press statement can be argued to refer to the detained persons the fact remains that the police need to carry out a thorough investigation on the activities of the persons detained based on information received. It must be noted that the press statement does not disclose the information which required a thorough investigation. It is this information and investigation being carried out which the respondent says he cannot disclose pursuant to para. 4 of his further affidavit. This paragraph is a re-assertion of what has already been asserted by the arresting officer in para. 8 of his affidavit and is in conformity with what has been stated by the respondent in the first two sentences of para. 2 of his press statement. I am therefore unable to agree with the submission of En. Zainur Zakaria that the further affidavit was affirmed by the respondent to overcome points raised by him in his submission on the press statement. I have no reason to doubt the *bona fides* of the respondent when he re-asserted the right of non-disclosure. In the circumstances it is my view that the press statement does not contain an exhaustive and detailed disclosure of the facts as the specific allegations made in it do not refer to the applicant. Even if they do so the fact that further investigation is required means that the press statement is not exhaustive. The disclosure against the applicant is therefore only partial. It follows that it is not possible for me to make an objective assessment and evaluation in order to ascertain whether the arrest and detention of the applicant is justified in the absence of the necessary facts to do so. The detention of the applicant cannot therefore be impugned based on the argument anchored on the press statement of the respondent. This does not mean that the applicant is without any further recourse. He can still show that his detention is unlawful if he can make out a case of *mala fides* against the respondent. I pause to add that I agree with Dato' Abdul Gani Patail that the respondent must be commended for having made the partial disclosure. He owed no duty to make such a disclosure yet he proceeded to do so. Quite obviously he did so in the interest of the public to explain in as many words as he could the reasons for the arrest in the light of objections to the use of the ISA by certain groups and the needs of the times.

a Whether The Applicant Has Made Out A Case Of *Mala Fides* Against The Respondent

b This requires a consideration of whether the detention of the applicant was made in bad faith and not the sufficiency of the grounds of detention. In support of his argument on this issue En Zainur Zakaria advanced several grounds. His first contention was that the persons responsible for the criminal acts disclosed in the press statement of the respondent ought to have been charged. He said that in the absence of any prosecution the detention of the applicant under the ISA is an act of bad faith. Bahirah binti Tajul Aris in affirming in her affidavit that the detention of the applicant is *mala fide* said in para. 15 of her affidavit,

c

Pihak SUHAKAM telah juga mendesak bahawa semua tahanan termasuk Pemohon dibebaskan dengan serta merta tanpa syarat dan sekiranya disyaki melakukan apa-apa kesalahan undang-undang, dituduh di Mahkamah yang sesuai.

d

The press statement of SUHAKAM reads as follows:

SUHAKAM, at its special meeting today, expresses its concern over the arrest of seven persons under the Internal Security Act (ISA) as reported today.

e

Since its inception and its first meeting on the 24th April 2000, SUHAKAM has been encouraged by signals perceived by us to indicate that the Government is slowly but surely being sensitized to human rights issues and is taking concrete steps to ensure that its concern for human rights is translated into action. The formation of SUHAKAM itself is proof of this trend.

f

It is against this backdrop that SUHAKAM expresses its deep regrets on the use of the ISA to detain the seven activists. Detention without trial constitutes a fundamental human rights violation.

SUHAKAM calls on the authorities to release the seven detainees immediately. If they have committed any offence, they should be charged and tried in an open court.

g

While SUHAKAM recognizes that the Government has, over the years, released many of those detained under the ISA, the present crackdown is cause for concern.

h

We strongly urge the authorities to allow families, lawyers and doctors immediate access to the detainees.

As a national human rights institution, SUHAKAM in accordance with section 4(2)(c) and (d) of the Human Rights Commission of Malaysia Act, 1999, will seek access to the detainees in order to monitor their mental, physical and general well-being.

i

In its current exercise of reviewing Malaysian laws that constitute infringements of human rights, in accordance with section 4(1)(b) of the same Act, SUHAKAM will make recommendations to the Government on the necessity of amending or repealing the Internal Security Act. a

In substance the call by SUHAKAM, in which Bahirah binti Tajul Aris sought refuge, is that the detainees should be charged and tried in an open court if they have committed any offence and that they must be released immediately. What arises for immediate consideration is whether the commission of any offence by a person warrants a prosecution and not detention as submitted by learned counsel and as advocated by SUHAKAM. This question was cogently and succinctly answered by Dato' Abdul Gani Patail in his reply. In saying that it is a fallacy to say that such a person must be charged and not detained under the ISA he referred to *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 where Ibrahim J (as he then was) said in the High Court at p. 134: b

It is contended by the applicant that the allegations of fact in paragraphs 8 and 11 in AI are criminal in character which should have been preceded with criminal action and their inclusion in AI shows the lack of good faith on the part of the Cabinet in making the order. d

I cannot accept this contention. Detention orders are made on evidence which may not strictly be admissible or sufficient to secure a conviction in a court of law but which the law taking into consideration the needs and exigencies of administration has allowed to be considered sufficient for the subjective decision of the authority. The mere fact that those two allegations are criminal in character therefore is not evidence of the lack of good faith on the part of the cabinet in making the order. e

In the Federal Court in that case Azmi LP said at p. 138: f

In India it has been held in *Jhala Jorubha v. The State* AIR [1952] Saurashtra EC 12 that whether a person should be prosecuted under the ordinary law or the Government should exercise their powers under the Preventive Detention Act is for the authorities to decide. At page 14 of the report Shah CJ in his judgment says this:- g

The authorities have laid down that the powers of the detaining authority are very wide under the law as it exists today. Government may detain a person even though the grounds clearly disclose that he could have been prosecuted under the ordinary criminal law with regard to those very grounds. The detaining authorities may, as I pointed out earlier, detain a person although a criminal court has acquitted him of the very charge for which he is being detained under the Security Act. Therefore, in our opinion, when the detaining authority makes up his mind to detain a person who is alleged to have committed an offence, then the detaining authority has made his choice and it could not be permissible to him h

i

- a* to investigate the offence while still keeping the person under detention and not complying with the provisions of the law with regard to investigation. Of course, it would be open to the detaining authorities to carry on an investigation into the offence provided they submit to the provisions of the law in this respect.
- b* In my view therefore, the failure in this case of the Minister to proceed against the appellant under the criminal law of the country is no indication that he has acted in bad faith.

In similar vein Edgar Joseph Jr J (as he then was) said in *Athappen a/l Arumugan v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1984] 1 MLJ 67 at p. 72:

- d* As Encik Zaki who appeared for the Respondent, rightly put it, the criminal conduct attributed to the Applicant, namely, criminal intimidation and damage to property were in a specified locality, namely, the York Road area, Pulau Pinang, over a period of time, namely 1982-83, not merely in his capacity as an individual but as a member of a secret society. Now, the activities of secret societies in this country are, I think, sufficiently notorious for me to take judicial notice of and there is the further fact that the Applicant was the subject of a Preventive Detention Order for six months ending in March, 1982, on grounds similar to those presently mentioned. All these considerations are destructive of the submission that there was *mala fides* on the part of the Respondent in the impugned Order.

As Abdoolcader J (as he then was) explained in *Yeap Hock Seng v. Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279 at p. 284:

- f* Mere circumvention of the ordinary process of law cannot by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.

- g* It is therefore clear that the arrest and detention of a person when he could have been prosecuted for a criminal offence is no indication of *mala fides*. It is the detaining authority which is to decide whether an act which is criminal in character is of such nature or proportion as to threaten national security that it would be inadequate to deal with it as an ordinary criminal offence but warrants it being dealt with under the ISA. That is the law. Thus it is inappropriate for a person or body of persons to call for the release of persons detained under the ISA and to prosecute and try them in an open court if they have committed any offence as it amounts to an unlawful interference with the lawful exercise of discretion by the detaining authority. I interpolate to add that it is no part of my function to delve into matters that have transpired outside the court. But where a party to a litigation relies upon such matters in support of its case it behoves upon me to ratiocinate their relevancy
- h*
- i*

in order to explain to the party the validity of the reliance on such matters. While I am convinced that SUHAKAM acts with the best of intentions, it must be realised that it is of prime importance that issues of what the law is and what it can and should or ought to be are kept separate so as not to risk confusing the public and, unwittingly, adding the proverbial oil to the fire. What the law can and should or ought to be is a part of an inquiry or study for the purpose of proposals for recommendations for policy decisions leading to changes in the law. That is the province of politics. On the other hand the court is confined in its duty to ascertaining what the law is and a corresponding application of it. It cannot afford, nor should it afford itself, the luxury of going beyond that. Confusing the law as it is with what it can and should or ought to be in the area of the law as in this case will only give false hopes to detainees and their understandably distraught loved ones, dependants, relatives and friends at a time when they are emotionally most vulnerable. False hopes only add to their pain when what they need most in such circumstances is the best legal advice based on an objective and meticulous study of what the law is.

En. Zainur Zakaria also contended that the press statement of the respondent containing mere allegations and accusations does not warrant detention under the ISA. The fact that the press statement is only a partial disclosure prevents me from considering this part of the submission as I explained earlier. Learned counsel then said that the affirmation of the further affidavit by the respondent stating that there are other reasons to justify the detention is an act of bad faith as he ought to have mentioned them in his press statement. This submission cannot also be sustained as it overlooks the right of the respondent under art. 151(3) of the Federal Constitution and s. 16 of the ISA to make nor not to make disclosures as he considers necessary. As I said in an earlier part of the judgment there can be partial disclosure and partial non-disclosure of facts. Learned counsel also said that the filing of the further affidavit by the respondent is for an ulterior purpose. As I explained earlier this does not show bad faith on the part of the respondent. I must add that I am unable to consider the press statement of the respondent for the purpose of the deliberation in progress as it is only a partial disclosure. In any event what has been disclosed does not reveal any *mala fides*. In the premises I am satisfied that the applicant has not discharged the burden on him to show that the respondent acted *mala fide* in his arrest and detention.

Denial Of Legal Representation

The remaining matter for consideration is whether the denial of legal representation to the applicant, if any, vitiates his detention. In response to a letter from solicitors for the applicant for counsel to be given access the respondent by letter dated 13 April 2001 replied as follows:

- a** 2. Adalah dimaklumkan bahawa penama di atas telah ditangkap di bawah Seksyen 73(1) Akta Keselamatan Dalam Negeri (AKDN), 1960 pada 10 April 2001 kerana dipercayai telah terlibat dalam kegiatan-kegiatan yang boleh memudaratkan keselamatan Malaysia. Siasatan ke atasnya masih diteruskan di bawah seksyen 73(3)(a)(b) dan (c) Akta Keselamatan Dalam Negeri (AKDN), 1960 sehingga penyiasatan ke atasnya tamat. Penama kini berada dalam keadaan baik, sihat dan tidak membimbangkan.
- b** 3. Sekiranya pihak puan mempunyai sebarang masalah berhubung dengan penahanannya, pihak puan boleh berhubung terus dengan kami.
- c** In his submission En. Sivarasa referred to cases such as *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, *Hashim bin Saud v. Yahaya bin Hashim & Anor* [1977] 2 MLJ 116 and *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293 to argue that the respondent can only refuse legal access to the applicant if he has substantial grounds not to do so. He submitted that failure to accord
- d** legal representation renders the detention illegal where more than one ground is advanced to impugn the detention. In support of this contention he referred to a passage from *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 at p. 201:
- e** In any event I do not think that *habeas corpus* is the right remedy for the applicant if his only complaint is that after his son Ooi's arrest his solicitor was denied immediate access to Ooi.
- f** It is my view that the right to legal access in the case of a person detained under the ISA must be considered in the light of art. 151(3) of the Federal Constitution and s. 16 of the ISA. These provisions authorise the detaining authority to refuse to disclose facts if such disclosure is against the national interest. I can safely assume that in the course of investigating into the activities of a detainee the police may have told the detainee certain facts and vice versa which may warrant further investigation. That is part of the investigative process. Such communications may fall within the ambit of the
- g** two provisions of law that I have referred to and the detaining authority may not want their revelation for the moment. If access is allowed to a detainee in such circumstances there is a possibility that he may part with whatever information that has been communicated to him. Denial of legal access to a detainee till the police think that it is appropriate to do so is, to my mind, to
- h** achieve the object of the provisions permitting non-disclosure of facts. It is perhaps for this reason that Salleh Abas LP said in *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293 at pp. 297-798:
- i**

When should a detainee arrested under section 73 of the Internal Security Act be allowed to exercise his right under Article 5(3) of the Constitution to consult a counsel of his choice? We would reiterate what was held by the Federal Court in *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198. In other words, the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of Article 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the Article.

This view is a balance between the interests of the person detained and the interests of the State. As Raja Azlan Shah FJ (as His Highness then was) said in *Hashim bin Saud v. Yahaya bin Hashim & Anor* [1977] 2 MLJ 116 at p. 118:

We too often think of the administration of justice simply as it relates to the protection of the rights of an accused person, that is, to know the charge against him, to be represented by counsel, to be confronted by witnesses, to have an impartial trial. But justice does not mean only for the accused; it also means the interests of the state, and not enough is paid to the interests of the state.

The matter must therefore be left to the good judgment of the detaining authority. A detainee under the ISA can therefore have legal access only when it does not interfere with police investigation. Even if this conflicts with art. 5(3) it is validated by art. 149 of the Federal Constitution. To that extent, it is my view that the letter by the respondent to the solicitors could have been better articulated though, as it stands, it conveys the same meaning couched, perhaps, in a vague manner. Be that as it may, the applicant has failed to show that the police has deliberately and with bad faith obstructed him from exercising his right under art. 5(3) of the Federal Constitution. The police action in denying legal access is therefore in accordance with law. Even if the applicant had been denied legal access unlawfully it has no bearing on the application before me. In support of this proposition I refer to the passage in *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 referred to by learned counsel. But I do not propose to confine myself to just that passage but also to what follows it which puts the matter under discussion to rest. This is what Suffian LP said at p. 201:

In any event I do not think that *habeas corpus* is the right remedy for the applicant if his only complaint is that after his son Ooi's arrest his solicitor was denied immediate access to Ooi. The juxtaposition of clauses (2) and (3) of article 5 does not mean that a person who is denied immediate access to his lawyer has his remedy by way of *habeas corpus*, for it is possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer. With respect I agree with the learned Chief Justice of Singapore in *Lee Mau Seng* when he said at page 141:

a In my judgment *habeas corpus* is not an available remedy to a person who, after his arrest by the police and under lawful detention by the police ... has been refused by the police to be allowed his constitutional right under article 5(3) of the Constitution to be allowed to consult a legal practitioner of his choice. Such a person must seek other available remedies ...

b I pause to add that if a constitutional right can be delayed I do not see any reason why a similar right provided by other laws such as s. 2(d) of the Human Rights Commission Act 1999 cannot be similarly delayed lawfully.

Section 8B(1) Of The ISA

c Section 8B(1) of the ISA reads as follows:

d There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

e Dato' Abdul Gani Patail argued that this provision should be extended to apply to section 73(1) of the ISA as well. In support he referred to *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293 where ss. 8(1) and 73(1) of the ISA were described as parts of one whole scheme. In opposing this argument En. Zainur Zakaria contended that such a construction of s. 8B(1) of the ISA is not permissible as the ISA must be strictly construed. In support of his argument he referred to *Liew Sai Wah v. Public Prosecutor* [1968] 2 MLJ 1 where Viscount Dilhorne in delivering the advice of the Privy Council said at p. 2:

f The Internal Security Act is a penal Act and must be construed strictly. In *Halsbury's Laws of England* Vol 36 page 415 paragraph 63 the following appears:-

g It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.

h As Lord Simonds said in *LNE Ry Co v. Berriman* [1946] AC 278 at page 313:

i A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the Court.

Section 8B(1) of the ISA is not a penal provision. It deals with the ouster of jurisdiction of the courts. The relevant rules of construction would therefore be those governing such ouster. In *Secretary of State v. Mask & Co* AIR [1940] PC 105 it was held that the exclusion of jurisdiction of courts is not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied. This rule of construction is not limited to civil courts alone, but applies to all courts of general application including criminal courts (see *Bhimsen v. State of UP* AIR [1955] SC 435). It is a principle by no means to be whittled down and has been referred to as a “fundamental rule” (see *Pyx Granite Co Ltd v. Ministry of Housing and Local Government & Ors* [1959] 3 All ER 1). It is plain that s. 8B(1) of the ISA does not contain express words to make it applicable to s. 73(1) of the ISA as well. What therefore requires consideration is whether the language employed in s. 8B(1) of the ISA implies its application to s. 73(1) of the ISA.

In order to answer that question it is first necessary to consider the object and scope of the ISA. It is a law that deals with preventive detention. It has been recognised that in matters relating to preventive detention the judges are the executive. The ISA is unquestionably not an ordinary regulatory legislation. Its object is to defend and uphold the national interest which includes threats to the very existence of the nation and its system of government under the Federal Constitution. It is for that reason that art. 149 of the Federal Constitution provides that such a law is valid even though it is inconsistent with any of the provisions of arts. 5, 9 or 10. Even the Universal Declaration of Human Rights 1948 recognises that there can be restrictions in the exercise of a person’s rights and freedoms by laws relating to, *inter alia*, public order. Article 29(2) of the said Declaration reads as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

I must add that the Human Rights Commission Act 1999 must be read and understood in this context pursuant to its s. 4(4) which reads as follows:

For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with Federal Constitution.

It is therefore manifestly patent that no valid complaint can be made or entertained on restrictions imposed on a person’s rights and freedoms in the face of their conflict with a law relating to public order though the very existence of such a law can be criticised. As the ISA has the highest purpose and objective to serve, though regarded by some as draconian, the applicability of s. 8B(1) to s. 73(1) of the ISA must be considered against that background.

- a** There is an inseparable nexus between s. 8(1) and s. 73(1) of the ISA. The arrest and detention of a person under the latter is pending inquiries to see if an order under the former should be made by the Minister. It is this connection between the two sections that caused Salleh Abas LP to say in *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 at p. 186:
- b** It is clear from the language of the two sections that section 73 provides for the initial detention and cannot be divorced from section 8 of the Act which provides for the final detention.
- Accordingly, the (then) Supreme Court proceeded to hold that since s. 73(1) and s. 8 of the ISA are so inextricably connected the subjective test should be applied to both. It is the nexus between both the sections that compelled the (then) Supreme Court in *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293 to hold that s. 16 of the ISA which is confined to “this chapter” also applies to s. 73(1) of the ISA which appears in another chapter. As Salleh Abas LP said at p. 286:
- c**
- d** Encik Sri Ram contended that this section is only confined to the provision of ‘this chapter’, and since the chapter under which section 16 is enacted is preventive detention pursuant to a ministerial order under section 8, it therefore cannot apply to the arrest at the initial stage pursuant to police power under section 73. This argument could only be right if we accept that there are two preventive detentions. We do not accept that argument. We regard that arrest and detention by the police and detention pursuant to a ministerial order or further detention after the matter has been considered by the Advisory Board as one continuous process beginning with the initial arrest and detention under section 73. We accept that the initial arrest and detention may or may not result in the issuing of the ministerial order of detention under section 8, but nevertheless, it is within one scheme of the preventive detention legislation.
- e**
- f**
- The highest court in the land has thus determined that s. 8(1) and s. 73(1) of the ISA must be read together as they are inseparable. A ministerial order of detention cannot be made under s. 8(1) without the initial arrest, detention and inquiries conducted under s. 73(1) of the ISA. They are therefore inter-dependent. The qualified right of judicial review available to impugn an act done or decision made by, *inter alia*, the Minister in the exercise of his discretionary power in accordance with the ISA would be meaningless if the process of collecting materials to be considered for the exercise of such discretion is not subjected to a similar qualification. In my opinion, bearing in mind the object of the ISA and the role of the courts in cases of preventive detention the restriction on the right of judicial review is of greater significance in the case of s. 73(1) than s. 8(1) of the ISA in view of the greater dependence of the latter on the former. Section 8(1) cannot function without s. 73(1) of the ISA. In the premises it is my view that Parliament clearly
- g**
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intended s. 8B(1) to apply to s. 73(1) of the ISA as well. I am guided in this interpretation by the interpretation given to s. 16 of the ISA in *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293. The view that I have expressed requires a consideration of s. 8B(1) of the ISA in order to determine the manner in which the applicant can challenge his arrest and detention. This section is a statutory reiteration in answer to the rejection of the subjective test enunciated in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 by the Singapore Court of Appeal in *Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals* [1989] 1 MLJ 69. In saying this I refer to the Explanatory Statement to Amendment Act No 739 which introduced s. 8B(1) of the ISA. It reads as follows:

The new section 8B removes from judicial review all acts done and decisions made by the Yang di-Pertuan Agong or the Minister in exercise of their discretionary power under the Act except in regard to any procedural requirement governing such act or decision. The intention of this new section is to decisively reaffirm the principle that the subjective test applies in determining the proper exercise of discretionary power by the Minister as laid down in the case of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, followed in the case of *Theresa Lim Chin Chin v. Inspector General of Police* [1988] 1 MLJ 293. This provision is necessary to avoid any possibility of the courts substituting their judgment for that of the Executive in matters concerning security of the country as has been done by courts in certain foreign countries which base their decisions on conditions totally different from Malaysia's. In matters of national security and public order, it is clearly the Executive which is the best authority to make evaluations of available information in order to decide on precautionary measures to be taken and to have a final say in such matters; not the courts which have to depend on proof of evidence.

The provision in s. 8B(1) of the ISA that there shall be no judicial review in any court in the case of, *inter alia*, a decision made by, *inter alia*, the Minister in the exercise of his discretionary power in accordance with the ISA means that the exercise of the discretion cannot be challenged. But it must be shown that the discretion was exercised in accordance with the ISA. This is an affirmation of the subjective test with the onus cast on the Minister to show that the detention was done in the exercise of a valid power. Thereafter the onus shifts to the detainee to show that the exercise of the power was *mala fide*. I pause to add, with respect, that I am unable to agree with the view expressed in *Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1993] 4 CLJ 155, on a construction of s. 7C of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, similar to s. 8B(1) of the ISA, that the court's jurisdiction on matters of *mala fide* is excluded. That view stemmed from the Singapore case of *Lee Mau Seng v.*

- a* *Minister of Home Affairs, Singapore & Anor* [1971] 2 MLJ 137 which is not the law in Malaysia. What, however, is now excluded is the objective consideration of facts as done in *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182. As I have already considered the issue of *mala fides* earlier it is unnecessary for me to go over it again.
- b* In the upshot it is my view that the applicant has not discharged the burden on him following the discharge of the burden by the respondent on him. Accordingly, I dismiss the motion of the applicant and that of the other four detained persons. I am unable to make an order of legal access to the applicant, as applied for by En. Sivarasa in the event I dismiss the application, as that
- c* is a matter for the detaining authority to decide. Needless to say, I would have done so if it had been established that the police had deliberately and with bad faith obstructed the applicant from exercising his right under art. 5(3) of the Federal Constitution which was not done. I did the most that I could in inviting learned counsel to write again to the police to request for an interview
- d* with his client. That would have at least been a court supervised application. Unfortunately my invitation was not accepted. There is nothing more that I can lawfully do.
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